

IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

NATIONWIDE MUTUAL FIRE  
INSURANCE COMPANY, et al.,

Plaintiffs,

v.

BOSCOV'S, INC.

Defendant.

C.A. No.: 2002-08-376 and  
2002-08-377

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Submitted: August 21, 2006

Decided: August 30, 2006

**DECISION AFTER TRIAL**

Plaintiff Nationwide Property & Casualty Insurance Company and plaintiff Berman Building Contractors, Inc. (collectively "Nationwide") bring this subrogation action against defendant Boscov's Inc. (hereinafter "Boscov's"), and claims that Boscov's breached the implied warranty of merchantability, codified in 6 Del. C. §2-314, when it sold a lamp to plaintiff's subrogee, Michelle Ferriola (hereinafter "Ferriola"), that malfunctioned and started a fire at Ferriola's apartment on December 1, 2001. Nationwide is the subrogor to both Ferriola and Berman Building Contractors, Inc. (hereinafter "Berman"). Nationwide seeks \$42,500.00 from Boscov's as reimbursement

for personal property loss and related damages paid to Ferriola after the fire, and also seeks \$30,404.56 from Boscov's as reimbursement for property damages paid to Berman.

This court bifurcated these proceedings and found, in its November 16, 2005 Letter Opinion, *Nationwide, a/s/o Ferriola & Berman v. Boscov's Inc.*, Del.Com.Pl., C.A. Nos.: 2002-08-376 and 2002-08-377, (hereinafter "November 16, 2005 Letter Opinion") that plaintiff proved, by a preponderance of the evidence, that Boscov's sold the defective lamp to Ferriola which caused the fire in her apartment. The Court herein incorporates by reference the findings of fact and conclusions of law set forth in its November 16, 2005 Letter Opinion. At the Court's request, the parties submitted post-trial Closing Argument Memoranda in support of their respective positions.

Upon careful examination and consideration of arguments submitted by counsel, the Court has determined that the sole issue remaining before the Court is Nationwide's claim that Boscov's breached the implied warranty of merchantability, 6 Del. C. § 2-314. The remaining arguments raised by Boscov's in its Closing Argument Memorandum are deemed abandoned since Boscov's failed to timely raise them at trial. In addition, in Boscov's Opening and Closing Memorandum Boscov's only asserts the implied warrant of merchantability in support of its claim and does not assert any other plead allegations in the complaint as a basis for recovery.

#### **ANALYSIS**

To prevail on a claim under the implied warranty of merchantability theory, a plaintiff must prove (1) that a merchant sold the goods; (2) which were defective at the time of sale; (3) causing injury to the ultimate consumer; (4) the proximate cause of which was the defective nature of the goods; and (5) that the seller received notice of the

injury. 6 Del. C. § 2-314, *Reybold Group, Inc. v. Chemprobe Technologies, Inc.*, 721 A.2d 1267 (Del.Supr.1998). The only element disputed by Boscov's is whether or not the defect in the lamp existed at the time Ferriola purchased it from Boscov's. In support of this argument, Boscov's rejects Randolph Marshall's (hereinafter "Marshall") expert testimony. At trial, Boscov's objected to Marshall's testimony, arguing unfair surprise. However, Nationwide correctly points out that Marshall's testimony was properly admitted at trial, and this Court did not accept Boscov's objection to admitting his testimony. Next, Boscov's sets forth several hypothetical situations in an effort to explain the lamp's defective status, including being improperly knocked over or moved by Ferriola or by a maintenance person having access to Ferriola's apartment, or that it could have fallen or been dropped when Ferriola was in the process of moving from her previous apartment. However, the direct examination of Marshall reflects that Marshall was unable to determine any other damage or wear and tear to the lamp other than normal, customary use.

Marshall testified, under oath, his opinion and testimony to a reasonable degree of certainty in the field of electrical engineering and forensic electrical investigation. The record is absent of any evidence in the form of documents, testimony or otherwise that Boscov's has offered to rebut the validity of Marshall's expert testimony that no evidence of pre-fire "dents, dings or even bends in the metal..." existed, and furthermore, that there was "...no abuse no damage no indication of any wrongdoing to the lamp prior to the fire." Boscov's argues that since Marshall's testimony is not "definitive" it should therefore be discarded. However, plaintiff's burden is proof "by a preponderance of the evidence." As cited in the November 16, 2005 Letter Opinion, "the phrase

‘preponderance of the evidence’ has been defined to mean the side on which ‘the greater weight of the evidence’ is found.” *Taylor v. State*, 2000 WL 313501, at \*2 (Del.Supr.), quoting *Reynolds v. Reynolds*, 237 A.2d 708, 711 (Del.Supr.1967). Thus, it is Boscov’s who has failed to *overcome* the weight of evidence brought forth by Nationwide regarding the presence of the defect at the time Ferriola purchased the lamp from Boscov’s. 6 Del. C. §2-314.

### **DECISION AND ORDER**

It is clear from the record that plaintiff has met its burden as to all elements in this case for a breach of implied warranty claim under 6 Del. C. §2-314. However, the Court finds Ferriola’s testimony far less than credible. The Court greatly hesitates an award of damages to Nationwide to the full extent of Ferriola’s \$40,000.00 policy limit when the overwhelming and voluminous evidence in the record shows a history of habitual and chronic false reporting. At best, Ferriola’s credibility at this trial was subsequently impeached and her veracity largely questioned as to the issue of damages and the claimed losses. As stated in the Court’s November 16, 2005 Letter Opinion, defense counsel used Ferriola’s Bankruptcy Schedules to show the Court that as of July 24, 1998, Ferriola certified to the United States Bankruptcy Court for the Eastern District of Pennsylvania that the full value of her personal property was \$5,825.00. According to the U.S. Bankruptcy Court documents and certified employment records, Ferriola’s total disposable income from 1998-2001 was \$25,412.38. The value of Ferriola’s claimed losses from the fire exceeded \$78,000.00.

Using a preponderance of the evidence standard, and in the face of overwhelming documentary evidence concerning Ferriola’s background and the nature of her felony

convictions which place her credibility in a strong negative light, the Court finds that Nationwide has not shown, by a preponderance of the evidence, that Ferriola's losses exceed \$78,000.00 or that the losses evenly remotely approximate the \$40,000 covered in her insurance policy plan with Nationwide.

The Court acknowledges that Ferriola has, in fact, suffered *some* quantifiable degree of personal property loss due to the fire based upon the burden of proof by a preponderance of the evidence. However, considering Ferriola's representation as to the full value of personal property on July 24, 1998 of approximately \$5,825.00, and her total disposable income from 1998-2001 of \$25,412.38, the Court cannot justify awarding damages to Nationwide in excess of the full value represented to the Bankruptcy Court for the Eastern District of Pennsylvania of \$5,825.00, plus \$2,500.00 of living expenses which Nationwide paid to Ferriola when she lived in substitute housing for two and a half months following the fire.

The Court therefore awards to Nationwide \$8,325.00 for payments made on Nationwide's behalf to Ferriola, plus \$30,404.56 for payments made to Berman based upon the proof at trial by a preponderance of the evidence plus court costs, attorney's fees, and interest at the legal rate.

**IT IS SO ORDERED** this 30th day of August, 2006.

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John K. Welch  
Judge

cc: Rebecca A. Dutton  
Civil Case Manager